STATE OF MICHIGAN

IN THE SUPREME COURT

GLENN S. MORRIS,

Plaintiff/Appellee,

v.

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C., a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, LLC,

Defendant/Appellant.

Supreme Court Nos. 149631 - 149633

Court of Appeals Case Nos. 315742/315007

Circuit Court Case No. 09-001878-CB

Circuit Judge Christopher P. Yates

MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC,

Plaintiff/Appellee,

v.

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C., a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, LLC,

Defendant/Appellant.

Supreme Court Nos. 149631 - 149633

Court of Appeals Case No. 315702

Circuit Court Case No. 09-011842-CB

Circuit Judge Christopher P. Yates

APPELLANT NEW YORK PRIVATE INSURANCE AGENCY, LLC'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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APPELLANT NEW YORK PRIVATE INSURANCE AGENCY, LLC'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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This Supplemental Brief is submitted in response to this Court's Order dated April 1, 2015, permitting the submission of a supplemental brief. However, in accordance with the Court's directive, this Supplemental Brief supplements certain arguments made in NYPIA's Application and Reply,[1] but does not recapitulate the arguments and support set forth in the aforementioned pleadings.[2]

The instant application raises the significant issue of constitutional due process and the authority of a Michigan court to enter judgment against a person previously dismissed from an action and on claims previously dismissed with prejudice. Such an issue is a matter of significant public importance and of interest to the state's jurisprudence. Moreover, neither the trial court nor the Michigan Court of Appeals cited any applicable Michigan Supreme Court precedent in support of their respective holdings. Nor has the Appellee. Accordingly, this matter is particularly ripe for adjudication by this Court under MCR 7.302(B).

The supreme courts of other states have accepted on leave to appeal issues of due process like the one presented here. See, for example, *Panaka v Nagata*, 868 P2d 450 (Haw 1994); *In re Foster*, 324 Mont 114 (2004).[3] The United States Supreme Court has also accepted cases addressing the violation of due process rights in connection with an adverse judgment against a

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[1] The defined terms utilized in this Supplemental Brief are those terms defined in NYPIA's Application for Leave to Appeal ("Application") and Reply in Support of Application for Leave to Appeal ("Reply").

[2] As previously discussed in NYPIA's briefing, the plaintiffs spend a significant amount of effort in their attempt to spin facts not supported by the record. However, in an effort not to consume the Court's time with allegations not germane to the legal issue presented in the instant Application, the hyperbole will be replaced in this brief by supplemental and direct analysis of the Appellate Court's ruling.

[3] The cases cited herein, save those attached, are more fully cited and discussed in the Application and Reply.

non-party. See, for example, *Nelson v Adams USA, Inc*, 529 US 460 (2000). Finally, this Court still has a history of addressing the issue in the context of the authority of a trial court to enter judgment against a non-party or a former party who had been dismissed from an action. See, for example, *Capital Savings & Loan Co v Standard Savings & Loan Ass'n*, 264 Mich 550; 250 NW309 (1933) and *Teamsters v Gen Cty Bd of Cmm'rs*, 401 Mich 408; 258 NW2d 55 (1977). Thus, the issue presented before this Court is an issue for which this Court, as well as other supreme courts, have determined significant to their respective jurisprudence.

A. THE COURT DEPRIVED NYPIA OF DUE PROCESS BY ENTERING JUDGMENT AGAINST IT IN A CASE TO WHICH IT WAS NO LONGER A PARTY AS THE CLAIMS AGAINST IT ALREADY HAD BEEN DISMISSED WITH PREJUDICE

The Appellate Court's ruling on the issue before this Court is contained in pages 25-30 of the court's Opinion.[4] This is the only portion of the Opinion that addresses NYPIA's appeal and the issue before this Court. The Appellate Court in page 26 of its Opinion commences by concluding that NYPIA was not deprived of due process and that the trial court had authority to enter judgment against NYPIA, followed by its explanation for the ruling.[5]

First, the Appellate Court noted that in the 2007 Dissolution Action Morris motioned to add NYPIA as a "real party in interest." However, that motion was not granted and NYPIA

[4] The Opinion of the Court of Appeals is attached as Exhibit 22 to the Application. Counsel apologizes for the error in identifying Exhibit Nos. 15 and 16 to the Reply. Exhibit Nos. 15 and 16 to the Reply should have been correctly cited and attached as Exhibit Nos. 23 and 24. Exhibit Nos. 1-21 are attached to NYPIA's Brief on Appeal and Reply to Response to Brief on Appeal and part of the record before this Court. The three Exhibits to this Supplemental brief are therefore numbered 25-27.

[5] This Court should note that the trial court only cited to a single case for its authority to enter judgment against non-party NYPIA. The case is an unpublished appellate decision, *Zigmond Chiropractic, PC v AAA Mich Auto Ins Ass'n*, No 300296 (Mich App Aug 7, 2012)(December 27, 2012, Verdict, p 16) which the plaintiffs do not contest does not support the trial court's decision. Nor does the Appellate Court mention the case.

never became a party to the Dissolution Action. Rather, Morris later filed a Contempt Motion against, among others, NYPIA who was not joined as a defendant to the Dissolution Action. The Contempt Motion was ultimately denied with respect to NYPIA.

Next, the Appellate Court notes that in the 2009 actions (the "Morris Action" and the "MSG Properties Action"), in which NYPIA was originally a defendant, NYPIA argued in support of its Motions for Summary Disposition that it, among other things, was a good-faith transferee in connection with the respective plaintiffs' actions for fraudulent transfer and seeking recourse under the UFTA. (Ex. 22, p. 26). As the Appellate Court then correctly points out, the trial court granted summary disposition to NYPIA on all claims, including the UFTA claims brought by the plaintiffs. *Id*. However, the Appellate Court did not address the legal consequence of the trial court dismissing with prejudice plaintiffs' claims on NYPIA's Motions for Summary Disposition, including the very UFTA claims on which the trial court then proceeded to enter judgment against NYPIA. NYPIA did not conduct discovery in the actions, and plaintiffs did not appeal the granting of summary disposition in favor of NYPIA.

The Appellate Court further indicates that NYPIA participated in various discovery motions, but then clarified in a quote from the trial court that NYPIA had to worry about "third party discovery… even if there is no potential liability" *Id*. Thus, as the Appellate Court correctly notes, NYPIA was only the subject of third-party discovery and did not have the opportunity as a non-party to conduct its own discovery. It is not disputed that NYPIA was not permitted to conduct discovery after the actions against it were dismissed.

The Appellate Court then states that NYPIA was a participant in the proceeding by the trial court, but fails to address the undisputed fact that NYPIA was only at the proceeding to

defend against the Contempt Motion in the Dissolution Action. Notably, the Dissolution Action was not consolidated with the Morris Action or the MSG Properties Action.

In fact, Morris and MSG Properties sought to consolidate their 2009 actions, but the Court denied the Motion for Consolidation (see Order Denying Motion for Consolidation attached as Ex. 25). Moreover, although the Motion was denied without prejudice subject to a future motion to be filed after discovery to consolidate the 2009 cases, no such motion was brought by either Morris or MSG Properties. Nor did Morris or MSG Properties motion to consolidate the 2007 Dissolution Action with the either of the 2009 actions.

The Appellate Court does not address the fact that the cases were not consolidated and that NYPIA was only present in Court as the subject of the Contempt Motion.[6] The Appellate Court not only failed to address the impact of the trial court's Orders Granting Summary Disposition in favor of NYPIA on all counts, including on the UFTA claims, brought in the Morris Action and the MSG Properties Action, but also did not address the case law concerning the trial court's lack of authority after dismissing all claims against NYPIA with prejudice.

It is also important to recognize that counsel for Morris and MSG Properties stipulated that the claims dismissed in their respective actions against NYPIA were being included in their amended complaint "only" for the preservation of appellate rights. On March 19, 2010, the plaintiffs in the Morris Action and the MSG Properties Action sought to amend their respective complaints in order to add an additional count against MSG, and in connection therewith submitted that day a stipulation, entered as an order by the court, which included the following:

> IT IS FURTHER ORDERED that this Court's prior Opinion and Order Granting Motion for Partial Reconsideration and Granting Summary Disposition on Counts Two and Four and Opinion and

[6] See, for example, Application pp. 20-23 and Reply pp. 3-4, 6.

> Order Granting Summary Disposition in Favor of Defendant New York Private Insurance on Counts Two and Four, both entered on February 4, 2010 in Case No. 09-01878-CB and this Court's Prior Opinion and Order Granting in Part, and Denying in Part, Defendants' Motions for Summary Disposition entered on October 22, 2009 in Case No. 09-01878-CB, are applicable to Morris' Second Amended Verified Complaint, despite being included in the Second Amended Verified Complaint. **Morris acknowledges that such claims and parties have been dismissed and he has only included such claims and parties in the Second Amended Complaint in order to preserve his rights on appeal**. The only claims remaining in this action are Morris' claims 1) in Count I, against MSG and Charron & Hanish, PLC under Section 4(1)(a) of the uniform Fraudulent Transfer Act, and 2) under Count V, against MSG for Breach of Contract.
>
> IT IS FURTHER ORDERED that this Court's prior Opinion and Order Granting in Part, and Denying in Part, Defendants' Motions for Summary Disposition entered on February 16, 2010, in Case No. 09-11842-CB, is applicable to MSG Properties' First Amended Verified Complaint, despite being included in the First Amended Verified Complaint. **MSG Properties acknowledges that such claims and parties have been dismissed and it has only included such claims and parties in its First Amended Complaint in order to preserve its rights on appeal**. The only claims remaining in this action are MSG Properties' claims 1) in Count I, against MSG and Charron & Hanisch, PLC under Section 4(1)(a) of the Uniform Fraudulent Transfer Act, and 2) in Count IV, against MSG for Breach of Contract.
>
> [Ex. 26.] [emphasis added.]

Thus, counsel for the plaintiffs in both the Morris Action and MSG Properties Action stipulated to an order, and the trial court entered same, declaring that NYPIA had been dismissed from both actions, which included the dismissal of the UFTA claims, and that the amended complaints filed by the respective plaintiffs in their actions "only" included NYPIA "in order preserve [the plaintiffs'] rights on appeal." (Ex. 26). Accordingly, not only did the court enter orders granting summary disposition in full to NYPIA, but the plaintiffs in both actions stipulated to an order, entered by the court, declaring that the actions included NYPIA for the sole purpose of

preserving the plaintiffs' rights on appeal. Notably, neither Morris nor MSG Properties appealed the court's granting of summary disposition in favor of NYPIA.

It is also important to note that the Appellate Court in stating a definition of due process, cites the following from *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1985):

> "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance and respond to the evidence." *Id*.

An operative term in the aforementioned quotation being "a party".[7] Thus, consistent with the case law relied on by NYPIA's in its Application and Reply Brief, it was required that NYPIA be made an active party to the Morris Action and the MSG Properties Action in order for the court to have entered judgment against it. This is consistent with this Court's own longstanding precedent. See *Capital Savings & Loan Co*, *supra*, and *Teamsters*, *supra*. Unfortunately, the Appellate Court did not follow the very law on which it relied.

Lastly, this Court should take note of the recent opinion by the United States Court of Appeals for the Sixth Circuit, filed April 14, 2015, in *Presidential Facility, LLC v Pinkas*, 2015 US App LEXIS 6318; 2014 FED App 0279P (6th Cir) (Ex. 27), in which the Sixth Circuit held that, under Michigan law, an alleged fraudulent transferee must be added as a party to the action in order to afford that party due process rights. 2015 US App LEXIS 6318, *3. This ruling is on point with the issue before this Court.

1. NYPIA's Motion For Reonsideration Did Not "Cure" The Due Process Violations

Although the Appellate Court does not go so far as finding that a motion for reconsideration cured any constitutional deficiencies, the court instead states that a filing a

[7] Also see the distinction between "person" and "party" under the Michigan Court Rules, *infra* Section A.2.

motion for reconsideration after the issuance of the judgment "afforded an additional opportunity to set forth [NYPIA's] arguments on this issue" (Ex. 22, p. 28). However, the Appellate Court did not address that a motion under 2.119(F) is only permitted for reconsideration "of the decision on a motion". MCR 2.119(F)(1). Moreover, the grounds for reconsideration must "show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). In the present matter, there was no decision on a motion for which reconsideration was sought. A motion for reconsideration cannot be utilized as a replacement for a trial or hearing on the merits of a cause of action against a party. Instead, a judgment was issued against a non-party on claims that had been dismissed on summary disposition years earlier. A motion for reconsideration is not permitted other than to address a decision on a motion, which did not occur in the 2009 cases. Thus, NYPIA was not afforded any additional due process by MCR 2.119(F).

2. MCR 2.205 Also Prohibits Judgment Against A Non-Party

It is interesting to note that parties who are not joined as a plaintiff or defendant in a case are referred to in MCR 2.205[8] as "persons" while those who are present as a plaintiff or defendant are referred to as a "party". MCR 2.205(A) provides that "persons having such interest in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests." In other words, in order for a court to adjudicate an interest against a "person", that person must be a plaintiff or defendant in the action. *Id*. This is consistent with the precedent cited by NYPIA in both its Application and Reply. Because

[8] For example, in MCR 2.205(B) it states "When persons described in subrule (A) have not been made parties…."

NYPIA was dismissed as a defendant in both the Morris Action and the MSG Properties Action years prior to the court's judgment dated December 27, 2012, NYPIA was not a defendant in either the Morris Action or the MSG Properties Action when the actions were tried. Thus, in addition to the subject case law, the judgment against NYPIA was not permitted under MCR 2.205.

Finally, the Appellate Court misplaces reliance on *United States Automobile Ass'n v Nothelfer*, 195 Mich App 87, 89; 489 NW2d 150 (1952), for the proposition that the burden falls on a defendant to object when a plaintiff fails to comply with MCR 2.205. The case cited does not support this proposition. Rather, the court in *United Services Auto*, *supra*, held that a defendant already joined in an action under MCR 2.205 has the burden of objecting to its "misjoinder" as a party to the action. *Id*. The case does not stand for the proposition that a "non-party" must raise objection that it is a necessary party and must be made a plaintiff or defendant to an action under MCR 2.205. *Id*.[9]

CONCLUSION

In short, the Appellate Court's Opinion gives cause for grave concern to the bar of this state and should equally concern this Court. The holding of the Court of Appeals in this matter is contrary to the longstanding precedent of this Court, the holdings of the supreme courts of certain other states, and the principles proclaimed by the United States Supreme Court. Though unpublished, it is a ruling that could significantly disrupt jurisprudence in this state if considered or relied on by trial courts.

Furthermore, the matter is certainly one of significant public interest as it exposes non-parties to judgment in actions in which the person is not a defendant and has not had the

[9] See also discussion in NYPIA's Brief on Appeal, commencing at page 17.

protections and processes afforded a defendant to an action under this state's laws and rules. Will the holding now also provide authority to enter judgment against a person on a cause of action previously dismissed with prejudice on summary disposition and for which such ruling was not appealed.

For all of the reasons set forth above , this Court should reverse the Opinion of the Court of Appeals, and vacate the Judgments against NYPIA issued by the Circuit Court in the Morris and MSG Properties' Actions. In addition, there is no basis to remand the actions, as Appellees did not appeal the Circuit Court's granting of summary disposition in favor of NYPIA in the Morris and MSG Properties Actions. Nor did the plaintiffs previously request any other relief and cannot request same for the first time before this Court.

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Dated: May 13, 2015

CERTIFICATE OF SERVICE

The undersigned states that on **May 13, 2015**, I electronically filed *Appellant New York Private Insurance Agency, LLC's Supplemental Brief in Support of Application for Leave to Appeal* with the Michigan Supreme Court by using the TrueFiling electronic filing system. Notice of same will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Mark A. Aiello
Mark A. Aiello

EXHIBIT 25

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

MORRIS, SCHNOOR & GREMEL PROPERTIES, INC.,

Plaintiff,

vs.

MORRIS, SCHNOOR & GREMEL, INC.; DAVID W. CHARRON, individually; CHARRON & HANISCH, P.L.C., a limited liability company; and NEW YORK PRIVATE INSURANCE, LLC,

Defendants.
_____/

Case No. 09-11842-CR

HON. CHRISTOPHER P. YATES

ORDER DENYING, WITHOUT PREJUDICE, MOTION FOR CONSOLIDATION

For reasons set forth on the record at a hearing held on December 11, 2009, IT IS ORDERED that the motion of Plaintiff Morris, Schnoor & Gremel Properties, Inc., to consolidate the above-captioned case with 17th Circuit Court case number 09-01878 is denied without prejudice to a future motion filed after discovery is completed in the above-captioned case.

IT IS SO ORDERED.

Dated: December 11, 2009

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

EXHIBIT 26

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

GLENN S. MORRIS,

Plaintiff,

v

MORRIS, SCHNOOR & GREMEL, INC., DAVID W. CHARRON, individually, CHARRON & HANNISCH, P.L.C, a limited liability company, and NEW YORK PRIVATE INSURANCE, LLC,

Defendants.

And

MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC,

Plaintiff,

v

MORRIS, SCHNOOR & GREMEL, INC., DAVID W. CHARRON, individually, CHARRON & HANISCH, P.L.C., a Limited liability company, and NEW YORK PRIVATE INSURANCE LLC.,

Defendants.

Honorable Christopher P. Yates

Case No.: 09-01878-CB

Case No. 09-11842-CB

STIPULATED ORDER REGARDING AMENDMENT OF PLEADINGS

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ORDER

At a session of said Court held in the Courthouse,
Kent County, Grand Rapids, Michigan, on the
_____ day of _____, 2010.

PRESENT: HONORABLE CHRISTOPHER P. YATES,
Circuit Judge.

This matter having come before the Court on the stipulation of the parties, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiff Glenn S. Morris' ("Morris") Motion to File Second Amended Verified Complaint is hereby granted for the purpose of adding as Count V – a Breach of Contract claim solely against Defendant MSG.

IT IS FURTHER ORDERED that Plaintiff Morris, Schnoor & Gremel Properties, LLC's ("MSG Properties") Motion to File First Amended Verified Complaint is hereby granted for the purpose of adding as Count IV – a Breach of Contract claim solely against Defendant MSG.

IT IS FURTHER ORDERED that only Defendant MSG is obligated to file an answer to the foregoing amended complaints. The previously filed answers by the other Defendants shall be applicable to the amended complaints.

IT IS FURTHER ORDERED that this Court's prior Opinion and Order Granting Motion for Partial Reconsideration and Granting Summary Disposition on Counts Two and Four and Opinion and Order Granting Summary Disposition in Favor of Defendant New York Private Insurance on Counts Two and Four, both entered on February 4, 2010 in Case No. 09-01878-CB and this Court's Prior Opinion and Order Granting in Part, and Denying in Part, Defendants' Motions for Summary Disposition entered on October 22, 2009 in Case No. 09-01878-CB, are applicable to Morris' Second Amended Verified Complaint, despite being included in the Second Amended Verified Complaint. Morris acknowledges that such claims and parties have

been dismissed and he has only included such claims and parties in the Second Amended Complaint in order to preserve his rights on appeal. The only claims remaining in this action are Morris' claims 1) in Count I, against MSG and Charron & Hanisch, PLC under Section 4(1)(a) of the Uniform Fraudulent Transfer Act, and 2) under Count V, against MSG for Breach of Contract.

IT IS FURTHER ORDERED that this Court's prior Opinion and Order Granting in Part, and Denying in Part, Defendants' Motions for Summary Disposition entered on February 16, 2010, in Case No. 09-11842-CB, is applicable to MSG Properties' First Amended Verified Complaint, despite being included in the First Amended Verified Complaint. MSG Properties acknowledges that such claims and parties have been dismissed and it has only included such claims and parties in its First Amended Complaint in order to preserve its rights on appeal. The only claims remaining in this action are MSG Properties' claims 1) in Count I, against MSG and Charron & Hanisch, PLC under Section 4(1)(a) of the Uniform Fraudulent Transfer Act, and 2) in Count IV, against MSG for Breach of Contract.

CHRISTOPHER P. YATES

Honorable Christopher P. Yates,
Circuit Judge

Agreed as to form and stipulated to entry:

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DATED: 3/19, 2010

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DATED: 3/19, 2010

BY: _____
David C. Gerling (P37459)

17,822,521.1\133922-00001

EXHIBIT 27

Presidential Facility, LLC v. Pinkas

United States Court of Appeals for the Sixth Circuit

April 14, 2015, Filed

File Name: 15a0279p.06

Case No. 14-2059

Reporter
2015 U.S. App. LEXIS 6318; 2014 FED App. 0279P (6th Cir.)

; CDV CAPITAL, LLC

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.
Presidential Facility, LLC v. Debbas, 2014 U.S. Dist. LEXIS 93658 (E.D. Mich., July 10, 2014)
Presidential Facility, LLC v. Debbas, 2014 U.S. Dist. LEXIS 2282 (E.D. Mich., Jan. 9, 2014)
Presidential Facility, LLC v. Debbas, 2013 U.S. Dist. LEXIS 112236 (E.D. Mich., Aug. 9, 2013)

Core Terms

judgment debtor, personal jurisdiction, third party, proceedings, fraudulent, transferred, adversely, parties, courts

Case Summary

Overview

HOLDINGS: [1]-The district court erred in denying a judgment creditor's motion to join parties that it believed might have received assets fraudulently transferred by the judgment debtor, as the district court bypassed the analytic framework under *Mich. Comp. Laws § 600.6128*; [2]-The district court's sua sponte finding that the creditor failed to establish personal jurisdiction over the alleged transferees was improper, as it clashed with the inquiry under *§ 600.6128* and the usual operation of state and federal civil procedure.

Outcome

Orders vacated; case remanded.

LexisNexis® Headnotes

Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution

HN1 See *Fed. R. Civ. P. 69(a)(1)*.

Civil Procedure > Judgments > Enforcement & Execution > General Overview

HN2 See *Mich. Comp. Laws § 600.6128*.

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

HN3 *Mich. Comp. Laws § 600.6128* sets forth a simple procedure for joining third parties who possess property in which a judgment debtor may have an interest. The creditor must present evidence that the judgment debtor "may have" an interest in property held by a third party. This is not an onerous burden as the word "may" indicates a possibility, not a certainty. Michigan courts consider an alleged fraudulent transferee to be a "person claiming adversely" within the meaning of *Mich. Comp. Laws § 600.6128*, whether or not that party affirmatively asserts his or her interest the transferred assets. Courts should equitably construe "person claiming adversely" to include all recipients of the debtor's fraudulently transferred assets.

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN4 Under *Mich. Comp. Laws § 600.6128*, after a creditor shows a judgment debtor might have an interest in property

held by another, the court shall by show cause order or otherwise cause the person claiming adversely to be brought in and made a party. Mich. Comp. Laws § 600.6128(2). Thus, the statute grants the trial court some discretion in deciding whether the judgment creditor has made the requisite showing, but once it decides the showing has been made, the trial court must add the third party holder of the property to the proceedings. Michigan courts generally interpret "shall" as mandatory language. Mich. Comp. Laws § 600.6128 is no exception. Mich. Comp. Laws § 600.6128 "requires" joinder of an alleged fraudulent transferee to accord her due process as well as to ensure complete relief in the event the creditor proves her claim.

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Waiver

HN5 Plaintiffs serve process after instituting an action and naming defendants; the defendants then either challenge the court's personal jurisdiction or submit to it. Fed. R. Civ. P. 3-4(a), 8(a), 12(b), (h); Mich. Ct. R. 2.101-.102, 2.108, 2.116. Personal jurisdiction is a waivable personal defense. Courts do not consider personal jurisdiction sua sponte. And judgment debtors lack standing to assert that defense on behalf of third parties. One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties.

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Judges: BEFORE: GUY, COOK, and McKEAGUE, Circuit Judges.

Opinion by: COOK

Opinion

COOK, Circuit Judge. In this contract action, Plaintiff-Appellant Presidential Facility, LLC seeks to recover a debt owed by Defendant-Appellee Gregory S. Campbell. The district court entered judgment in favor of Presidential two years ago, and Presidential instituted supplementary proceedings to aid in execution of the judgment. Believing that Campbell fraudulently transferred assets to his wife, Appellee Diane Campbell, and two closely held businesses, Appellees Chester County Aviation Holdings, LLC and CDV Capital, LLC, Presidential moved to join them as parties to the post-judgment proceedings. *See* Fed. R. Civ. P. 69; Mich. Comp. Laws § 600.6128. The district court denied the motion because Presidential failed to show that the court had personal jurisdiction over the new parties. The court later denied a renewed motion and a motion for reconsideration on the same [*2] grounds. Presidential appeals, and we VACATE the district court's orders and REMAND for further proceedings.

HN1 "[P]roceedings supplementary to and in aid of judgment or execution . . . must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). Here, both sides agree that Michigan Compiled Laws ("MCL") § 600.6128 governs Presidential's ability to bring Diane Campbell and the businesses into supplemental proceedings, but they dispute whether the statute permits courts to require a showing of personal jurisdiction before joining new parties.

MCL § 600.6128 provides in relevant part:

> ***HN2*** (1) Where it appears to the court that:
>
> (a) The judgment debtor may have an interest in or title to any real property, and such interest or title is disclaimed by the judgment debtor or disputed by another person;
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> (b) The judgment debtor may own or have a right of possession to any personal property, and such ownership or right of possession is substantially disputed by another person; or
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> (c) A third party is indebted to the judgment debtor, and the obligation of the third party to pay the judgment debtor is disputed; the court may, if the person or persons claiming adversely is [*3] a party

> to the proceeding, adjudicate the respective interests of the parties in such debt or real or personal property, and may determine such property to be wholly or in part the property of the judgment debtor, or that the debt is owed the judgment debtor.
>
> (2) If the person claiming adversely to the judgment debtor is ***not a party*** to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto, and shall set such proceeding for early hearing.

Id.

HN3 The statute sets forth a simple procedure for joining third parties who possess property in which the judgment debtor may have an interest. *See* Ducana Windows & Doors, Ltd. v. Sunrise Windows, Ltd., No. 09-12885, 2014 U.S. Dist. LEXIS 58913, 2014 WL 1683279, at *3-4 (E.D. Mich. Apr. 29, 2014) (applying the proper procedure). The creditor must present evidence that the judgment debtor "may have" an interest in property held by a third party. This is not an onerous burden as "the word 'may' indicates a possibility," not a certainty. *Estes v. Titus*, 273 Mich. App. 356, 731 N.W.2d 119, 136 (Mich. Ct. App. 2006), *aff'd in relevant part*, 481 Mich. 573, 751 N.W.2d 493, 503-04 (Mich. 2008). Michigan courts consider an alleged fraudulent transferee to be a "person claiming adversely" within the meaning of MCL § 600.6128, whether or not that party affirmatively asserts his or her interest the transferred assets.[1] *See id.* at 137 (explaining that courts should equitably construe "person [*4] claiming adversely" to include all recipients of the debtor's fraudulently transferred assets).

HN4 After the creditor shows the judgment debtor might have an interest in property held by another, the court "shall by show cause order or otherwise cause [the person claiming adversely] to be brought in and made a party." MCL § 600.6128(2). Thus, the statute grants the trial court some discretion in deciding whether the judgment creditor has made the requisite showing, but once it decides the showing has been made, the trial court must add the third party holder of the property to the proceedings. Michigan courts generally [*5] interpret "shall" as mandatory language. *Browder v. Int'l Fid. Ins. Co.*, 413 Mich. 603, 321 N.W.2d 668, 673 (Mich. 1982). MCL § 600.6128 is no exception. *Estes*, 731 N.W.2d at 137 (quoting Mich. Ct. R. 2.205) (holding that MCL § 600.6128 "required" joinder of the alleged fraudulent transferee to accord her due process as well as to ensure complete relief in the event the creditor proved her claim).

The district court bypassed this analytic framework. It made no determination as to whether Presidential had shown Gregory Campbell might have an interest in the transferred assets. Instead, it decided sua sponte not to join Diane Campbell and the other alleged transferees on the ground that Presidential failed to establish the court's personal jurisdiction. This was error.

Requiring proof of personal jurisdiction at this stage clashes not only with the inquiry set forth in MCL § 600.6128, but also with the usual operation of state and federal civil procedure. ***HN5*** Plaintiffs serve process *after* instituting an action and naming defendants; the defendants then either challenge the court's personal jurisdiction or submit to it. *See* Fed. R. Civ. P. 3-4(a), 8(a), 12(b), (h); Mich. Ct. R. 2.101-.102, 2.108, 2.116; *Gerber v. Riordan*, 649 F.3d 514, 518 (6th Cir. 2011) (holding that personal jurisdiction is a waivable personal defense). Courts do not consider personal jurisdiction *sua sponte*. *See, e.g.*, *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 994, 410 U.S. App. D.C. 41 (D.C. Cir. 2014); *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986) (per curiam); *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 701 (6th Cir. 1978). And judgment [*6] debtors like Campbell lack standing to assert that defense on behalf of third parties. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) ("One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties."); *Synthes, Inc. v. Marotta*, 281 F.R.D. 217, 229-30 (E.D. Pa. 2012) (rejecting party's standing to assert lack of personal jurisdiction on behalf of others and listing similar cases).

Accordingly, we VACATE the district court's orders denying Presidential's motion for post-judgment relief (August 9, 2013), renewed motion for post-judgment relief (January 9, 2014), and motion for reconsideration (July 10, 2014) and REMAND for further proceedings consistent with this opinion.

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[1] Campbell mistakenly relies on *Green v. Ziegelman*, 282 Mich. App. 292, 767 N.W.2d 660 (Mich. Ct. App. 2009). There the Michigan Court of Appeals reversed the trial court because it entered a second judgment holding the judgment debtor's principal shareholder—not named as a defendant in the underlying action or supplemental proceedings—personally liable for the entire debt under a veil-piercing theory. *Id.* at 664. The *Green* court explicitly distinguished that case from a fraudulent transfer claim like the one here. *Id.* at 667. Presidential seeks not to hold Diane Campbell personally liable for her husband's debt, but to recover specific assets allegedly fraudulently transferred.